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LEE LAI CHING

v.

LIM HOOI TEIK

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HIGH COURT MALAYA, PULAU PINANG
ZAMANI A RAHIM J
[CIVIL SUIT NO: 22-587-2004]
8 FEBRUARY 2013

C ***FAMILY LAW:*** *Children - Paternity - Whether DNA test should be ordered - Whether a person could be compelled to undergo DNA test against his will - Whether it would constitute hurt - Whether there was no specific provision of statute to order DNA testing - Best interest of child - United Nations Convention on the Rights of the Child, arts. 3 &* D *7 - Federal Constitution, art. 8*

The plaintiff (the natural mother of a minor) filed a claim against the defendant, to undergo a DNA test to determine the paternity of the minor. The defendant had denied that he was the father of the minor and refused to undergo the DNA test. Having no E specific statute to order DNA testing, the court referred to the United Nations Convention on the Rights of the Child ('CRC') and the Federal Constitution. The issues raised were, *inter alia*, (i) whether the DNA test should be ordered to resolve the issue of F paternity in the absence of any specific statute; and (ii) whether it would constitute hurt if the defendant was compelled to give blood samples for the DNA test.

Held (allowing plaintiff's claim with costs):

G **(1)** Having no specific provision of statute to order DNA testing, the court exercised its judicial discretion and gave regard to art. 3 of the CRC. It was in the best interest of the minor that the defendant be ordered to undergo DNA testing to determine the paternity of the minor. Once the status of the H defendant was determined, the interest of the minor would be secured and protected directly and indirectly. (paras 12 & 34)

(2) The minor was entitled to equal protection pursuant to art. 8 of the Federal Constitution and therefore had a right to know I the identity of his biological father. This could only be confirmed if the defendant was ordered to undergo a DNA test to confirm the same. (para 37)

(3) Pursuant to s. 319 of the Penal Code, an order for DNA should not be construed as 'hurt' because the *mens rea* or objective behind the DNA test was to determine the paternity of the minor. (para 16)

(4) Article 7 of the CRC was very much in conformity with the Federal Constitution, national laws and national policies of the Government of Malaysia. Therefore, it should be invoked and rendered applicable. (para 41)

Case(s) referred to:
Lai Meng v. Toh Chew Lian [2012] 10 CLJ 479 ***(foll)***
Lau Zhen Chen (An Infant by His Mother and Next Friend Lau Fatt Wan (f)) v. Makoto Togase & 2 Ors [1995] 1 CLJ 841 HC ***(refd)***
Noorfadilla Ahmad Saikin v. Chayed Basirun & Ors [2012] 1 CLJ 769 HC ***(refd)***
Peter James Binsted v. Jevencia Autor Partosa [2000] 2 CLJ 906 HC ***(dist)***
Re L [1968] 1 All ER 20 ***(refd)***

Legislation referred to:
Federal Constitution, art. 8(1), (2)
Penal Code, s. 319

For the plaintiff - T Tharumarajah; M/s T Tharumarajah & Assocs
For the defendant - Alan Lim Wei Lun; M/s Gan Teik Chee & Ho

Reported by Sandra Gabriel

JUDGMENT

Zamani A Rahim J:

Introduction

[1] This is a writ action filed by the plaintiff (as the next friend of Lim Chee Zheng and on behalf of herself) against the defendant. Having been agreed by both parties, this action is to be decided on points of law of which will be dealt with below.

Brief Facts

[2] The plaintiff is the natural mother of Lim Chee Zheng (hereinafter referred to as "the minor") and has filed a claim against the defendant for amongst others, that the defendant undergoes a deoxyribonucleic acid 'DNA' test to determine the paternity of the minor.

[3] The defendant has denied he is the father of the minor and has refused to undergo a DNA test to confirm the minor's paternity.

[4] The plaintiff met the defendant at an entertainment centre and consequently at the material time, the plaintiff was offered and accepted a commercial contract to be employed as a singer in the defendant's company, Follow Me Sdn Bhd. The defendant was a director of the company at the material time. The plaintiff and defendant began an intimate relationship from the time the contract commenced.

[5] The defendant denies that the plaintiff and defendant had an intimate relationship and as a result of that relationship, the minor was conceived and born.

Preliminary Issues

[6] Based on the facts of this case, the issues for this court consideration are as follows:

(a) Whether the defendant, Lim Hooi Teik, could be compelled to give and/or supply a sample of his blood for a DNA test to determine the paternity of the child by the name of Lim Chee Zheng.

(b) In the event the answer is yes, such consequential orders be made to enable the defendant to give such specimens required by the relevant hospital.

Can A DNA Test Resolve The Issue Of Paternity?

[7] In the case of *Lau Zhen Chen (An Infant by His Mother and Next Friend Lau Fatt Wan (f)) v. Makoto Togase & 2 Ors* [1995] 1 CLJ 841, the petitioner sought amongst others, for a declaration that the petitioner was the legitimate child of the first and second respondent.

[8] Both the first and second respondent had willingly undergone DNA testing to determine the petitioner's paternity. Therefore the issue therein was whether the blood test was necessary and whether the DNA test was conclusive as evidence of paternity.

[9] Amongst others, Abdul Malik Ishak J (as His Lordship then was) whilst making reference to the decision of Lord Denning MR held as follows: A

> In my judgment, where scientific evidence by means of a blood test, can resolve the issue of paternity conclusively, the interests of justice require that a blood test should be done, in the absence of strong reasons to the contrary. B

[10] On blood tests, Lord Denning MR had this to say in *Re L* [1968] 1 All ER 20 at p. 23:

> Blood tests are a modern development. Medical science is able to put the blood of individuals into definite groups; and by examining the blood of a given man and a child, the medical men can tell whether the man could or could not be the father of the child. They cannot say positively of any man that he is the father; but they can say positively that a given man cannot be the father, because the blood groups of him and the child are so different. The science has achieved such a degree of accuracy that, when a man is in truth not the father of a child, and desires to prove it, there is at least a seventy per cent chance, if blood tests are taken, that the doctors can prove positively that he is not the father. In some cases the chance is even higher. As, for instance, when, as in the present case, we know that one or other of two given men is the father, there is a ninety percent chance that the doctors can say positively that one of them is not the father, with the irresistible inference that the other man is the father. C D E F

[11] It is common knowledge that in the interest of justice, blood tests are accepted and deemed to resolve the issue of paternity conclusively.

[12] In protecting the interests of the minor herein, this court may accept the DNA test results to determine if the defendant is indeed the minor's biological father. Once the status of the defendant is determined, the interests of the minor will be secured and/or protected directly and indirectly. The status of the defendant will be positively ascertained after the DNA tests. G H

[13] However, the defendant has refused to undergo a DNA test willingly. Therefore this court would have to take a step further in answering the next question. I

A *Can The Defendant Be Compelled To Give A Sample Of His Blood For A DNA Test, To Determine The Paternity Of The Minor?*

[14] It is the defendant's contention that the decision in *Peter James Binsted v. Jevencia Autor Partosa* [2000] 2 CLJ 906; [2000] 2 MLJ 569 where KC Vohrah J (as His Lordship then was) held as follows:

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> There is no general power provided by legislation or through common law for any court in Malaysia to order a person to undergo a test to ascertain paternity. In the case of a DNA test, it is common knowledge that either a blood, tissue or bone specimen will be taken from the person for testing. If a person refuse to submit himself to such a testing, he is perfectly entitled to do so; a person cannot be subject to hurt within the meaning of s. 319 of the Penal Code against his will by submitting himself to such testing. Whoever carried out such testing without the person's consent would violate s. 323 of the Penal Code for voluntarily causing hurt to the person and a court cannot, in the absence of a specific legislative provision, order such person to submit himself to an unlawful act to be committed on his person (see p. 571C-D).

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[15] For ease of reference the meaning of hurt pursuant to s. 319 of the Penal Code reads as follows:

> Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt.

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[16] Therefore, an order for DNA testing should not be construed as "hurt" as defined in the Penal Code because the *mens rea* (intention) or objective behind the DNA test is to determine the paternity of the minor.

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[17] No intentional harm is caused to the defendant as a sample of his blood is required for the sole purpose of a DNA test. Further, with the advent of technology, DNA test may not necessarily require an extraction of the defendant's blood but a simple swab of the defendant's sweat or saliva would suffice.

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[18] However, the interest of the minor and the argument should not limit itself to the "hurt" that may be caused to the defendant (which is denied by the plaintiff), should the defendant be ordered to undergo DNA testing.

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[19] What this court should consider is whether in determining the paternity of the minor, the DNA test on the defendant is in the best interest of the minor? A

[20] Therefore the decision in *Peter James Binsted v. Juvencia Autor Partosa* [2000] 2 CLJ 906; [2000] 2 MLJ 569, may be distinguished as the said decision the court therein had not considered whether it was in the best interest of the child that DNA test be ordered. The issue therein gravitated toward whether the father of the child would be subject to hurt if a DNA test is ordered. The interest of the child therein was not considered at all. B C

United Nations Convention On The Rights Of The Child

[21] On the other hand, the plaintiff seeks to rely on the United Nations Convention on the Rights of the Child ('CRC') of which the Government of Malaysia acceded to on 17 February 1995, *albeit* expressing reservations to certain articles of the CRC. D

[22] However Malaysia's reservations are to arts. 1, 2, 7, 13, 14, 15, 28 (para. 1(a)) and 37 of the CRC but at the same time declared that the said provisions shall be applicable only if they are in conformity with our Constitution, national laws and national policies of the Government of Malaysia. E

[23] Therefore art. 3(1) of the CRC provides as follows: F

> Article 3
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> 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. G

[24] The plaintiff submits that the primary consideration of this court is the paramount or best interests of the minor. However this court is not suggesting that the rights of the defendant is to be negated altogether but to consider that the interest of the minor shall take priority or precedence. H

[25] If the birth certificate of the minor (see p. 1 of the plaintiff's bundle of document), it is noted that the particulars of the father have been omitted. Would it be just to the minor not know his father if the answer to that only dictates by a simple DNA test? I

[26] The plaintiff implores this court to consider that having a DNA test ordered against the defendant is indeed in the best interest of the minor. Closure as to the paternity of the Minor will be achieved and the minor will no longer be deprived of not knowing who his biological father is.

[27] In *Lai Meng v. Toh Chew Lian* [2012] 10 CLJ 479; [2012] 8 MLJ 180, the court was faced with, amongst others, the following issues:

(a) Whether the court had the jurisdiction to grant access to the putative father of an illegitimate child; and

(b) Whether access should be granted in the case.

[28] Nevertheless, Yeoh Wee Siam J held amongst others that "This court had the jurisdiction to decide on matters regarding access by a putative father to an illegitimate child after considering what was for welfare and best interest of the child (see para. 49)".

[29] In coming to the decision whether it was in the best interest of the child that the putative father be granted access to the child, the learned judge made the following consideration:

> [87] The Government of Malaysia acceded to the CRC on 17 February 1995 but in a declaration dated 19 July 2010 it expressed its reservations with respect to certain articles (which did not include articles 3 and 9) and declared that the said provisions shall be applicable only if they are in conformity with the Federal Constitution, national laws and national policies of the Government of Malaysia.
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> [88] The CRC applies to both legitimate and illegitimate children.
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> [89] Both articles 3 and 9 of the CRC state that the best interests of the child shall be the consideration for the matters provided therein. This is consistent with the welfare principle that I had earlier dealt with.

[30] Although the learned judge in *Lai Meng v. Toh Chew Lian*'s case held that granting access was not in the best interest of the child but what is of primary importance is the incorporation of the CRC into Malaysian common law.

[31] Therefore having precedent set in *Lai Meng v. Toh Chew Lian, supra* where the test, "best interests of the child" provided by the CRC was adopted and considered by our High Court in determining the issue of access.

[32] By adopting the same approach, and by invoking art. 3 of the CRC and consider that the best interest of the minor shall be the primary consideration in determining whether the defendant can be compelled to undergo a DNA test to determine the paternity of the minor.

[33] In addition, the applicability of the International Conventions/Treaties does not pose as unfamiliar to our High Court, an example is seen in *Noorfadilla Ahmad Saikin v. Chayed Basirun & Ors* [2012] 1 CLJ 769; [2012] 1 MLJ 832, where the court was tasked with deciding whether an untrained teacher who had an offer for employment as a temporary teacher withdrawn when she answered that she was pregnant. Zaleha Yusof J ruled that she was indeed discriminated and applied the United Nations Convention in Elimination of All Forms of Discrimination against Women of which Malaysia has been a signatory to since 1995.

[34] Therefore, with reference to the action before this court, having no specific provision of statute to order DNA testing, in the exercise of my judicial discretion having regard to art. 3 of the CRC, it is in the best interest of the minor that the defendant be ordered to undergo DNA testing to determine the paternity of the minor.

The Fundamental Liberties Of The Minor

[35] Where there is no specific statute allowing and/or disallowing a DNA test being a mechanism used to identify a person's identity, the plaintiff also submits that this court must also consider the fundamental liberties of the minor, in that the minor's interest is taken into consideration.

[36] Article 8(1) and (2) of the Federal Constitution provides as follows:

> Equality
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> 8. (1) All persons are equal before the law and entitled to the equal protection of the law.

A (2) Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the
B acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

[37] The minor is entitled to the equal protection of the law and therefore has a right to know who his biological father rightfully
C is. This can only be confirmed if the defendant is ordered to undergo a DNA test to confirm the same.

[38] Consequently, art. 7 of the CRC *albeit* being a reservation of the Malaysian Government (as discussed above) may be
D invoked.

[39] Article 7 of the CRC reads as follows:

Article 7

E The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents.

[40] Article 7 of the CRC is consistent with the provisions of
F fundamental liberties as provided in the Federal Constitution. The minor has a right to know whether the defendant is his father and it is only in the best interest of the minor that a DNA test is ordered to confirm the same.

G **[41]** Therefore art. 7 of the CRC should be invoked and rendered applicable as it does not contradict but very much in conformity with our Federal Constitution, national laws and national policies of the Government of Malaysia.

Conclusion

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[42] Having no specific provision of statute that allows and/or disallows an order for DNA testing for the purposes of paternity. I have download from Wikipedia, the free encyclopedia on the legal issues on parental testing in other jurisdictions.

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[43] In the United States, paternity testing is fully legal. A court ordered paternity test may be used as evidence in court proceedings.

[44] In Canada, personal paternity testing kits are available to fathers. The courts also have the power to order paternity tests during divorce cases.

[45] In the United Kingdom (UK), tests are sometimes ordered by courts when proof of paternity is required. The UK Ministry of Justice accredits bodies that can conduct this testing.

[46] In France and Germany, any paternity testing without a court order is banned, due to fears that more families could be broken by divorce if all fathers were given access to them.

[47] In Israel, private paternity testing kits are available to fathers. The family courts have the power to order paternity tests against the will of the father in divorce and child support cases, as well as in other cases such as determining heirs and settling the question involving the population registry.

[48] In China, paternity testing is legally available to fathers who suspect their child is not theirs, though in such cases, biological bond is proven about 90% of the time. Under Chinese law, a paternity test is also required for any child born outside the one-child policy in order for the child to be eligible for a "*hukou*" or family registration record.

[49] It would appear that with varying degree of requirements or stipulations, the paternity testing may be ordered by the courts in the above mentioned jurisdictions. Likewise we too must not be lagging behind but be robust and cannot allow our criminal or civil jurisprudence be shackled by the ghost of *Peter James Binsted*, *supra* which was decided within a narrow scope about 13 years ago. Much water has flowed under the bridge since then.

[50] In exercising my inherent power and discretion of the court and indeed it is in the best interest of the minor that the defendant is hereby ordered to provide a sample for DNA testing to determine the minor's paternity as prayed in prayer 13(b) of amended statement of claim and a cost of RM3,000.

[51] It is ordered accordingly.